FA/1113/1998 1/24 JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 1113 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MODI BACHUBHAI S
Versus
NARESHCHANDRA C PATEL

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Appearance :
PARTY-IN-PERSON for Appellant
MR KV SHELATH for Respondent

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA
Date : 24/02/2006

CAV JUDGMENT

1 This Appeal is preferred by judgment creditor of Execution Application No. 473 of 1980 of the Court of City Civil Judge at Ahmedabad and Civil Misc. Application

No. 321 of 1987, which came to be filed in the said Execution Application by present appellant to remove obstructions. The said application to remove obstructions of present appellant i.e. original judgment creditor came to be rejected by learned City Civil Judge, Court No.5, Ahmedabad, on 21st of July, 1994 and hence this Appeal.

2 Brief facts for the purpose of this Appeal can be depicted as under :

2.1 One Dahyagar Hiragar preferred a Civil Suit No. 66 of 1963 against defendants including present appellant for declaration of title and possession of property. The property, subject matter of appeal, consists part and parcel of the said properties mentioned in Civil Suit No. 66 of 1963. The said Civil Suit No. 66 of 1963 was decreed in favour of Dahyagar Hiragar on 30th of November, 1967. Appeal being First Appeal No. 721 of 1967 came to be preferred against the said judgment and order which was dismissed on 13th of April, 1973. It appears that Special Leave Petition was also preferred before the Supreme Court, but the same was also dismissed and decree for declaration and possession of the suit property was,

therefore, became final in favour of plaintiff Dahyagar Hiragar. The property in question is popularly known as ? Bawana Dehla? and is situated at Sarangpur, Ahmedabad, bearing City C.No. 2470 of Khadia Ward No.3, City of Ahmedabad and M.C. No. 1465/9. Undoubtedly, this premises is a residential premises and is subject matter of this Appeal. The present appellant entered into an agreement to sell on 29.4.1964 with Dahyagar Hiragar in respect of the suit property known as ?Bawana dehla?. There was a term in the agreement that a sale deed shall be executed by Dahyagar either in favour of the present appellant or whoever be nominated by the present appellant. In pursuance of this agreement to sell, Dahyagar executed the sale deed on 3rd of December, 1973 in favour of Bai Laxmiben, wife of appellant and in the joint name of son of appellant as well as in the name of the present appellant, who also was one of the joint purchasers. Vide this sale deed, the property in question was fully conveyed to the purchaser. In the meanwhile daughter of Dahyagar, named as Bai Jotsna, preferred Civil Suit No. 3255 of 1974 in the City Civil Court at Ahmedabad against Dahyagar and present appellant and claimed a decree of declaration in respect of ownership of the property in question through Will alleged to have been propounded by

Bai Jadavben, mother of Dahyagar Hiragar. In the said Suit, the City Civil Court appointed officer of the Court to be Commissioner to take accounts in respect of suit property which came to be challenged by the present appellant before the High Court of Gujarat vide Appeal From Order No. 355 of 1977 and in the said Appeal From Order, this Court appointed present appellant Bachubhai as receiver of the suit property instead of officer of the court as appointed by the Court of City Civil Judge. The order of Appeal From Order is dated 19th of December, 1977.

2.2 Dahyagar Hiragar, plaintiff of Civil Suit No. 66 of 1963, preferred an Execution Application to execute the decree passed in his favour in Civil Suit No. 66 of 1963. The said Execution Application was withdrawn. With the permission of the court, in the capacity of receiver and as above said in the capacity of purchaser of property the present appellant preferred above said Execution Application No. 473 of 1980 to execute the decree passed in favour of Dahyagar Hiragar in Civil Suit No. 66 of 1963. In the said Execution Application No. 473 of 1980, vide amendment, present appellant mentioned description of boundaries in respect of the property in question and

obtained possession warrant against present respondent Nareshchandra Chhanalal Patel stating that the present respondent was in occupation of part of premises bearing Municipal Cession No. 1465/9 through defendants of Civil Suit No. 66 of 1963 and decree for possession was required to be executed against the present opponent.

2.3 The present respondent Nareshchandra Chhanalal Patel filed obstruction application and thereupon the present appellant Modi Bachubhai Sankalchand preferred a Civil Misc. Application No. 321 of 1987 in the said Execution Application No. 473 of 1980 to remove the obstructions and for the execution of the possession warrant.

2.4 The present respondent resisted the execution of possession warrant and Civil Misc. Application No. 321 of 1987 for removal of obstructions preferred by present appellant. The present respondent filed written statement at Exh.11. The present respondent denied all the averments made in the application for removal of obstruction and said that such application was not maintainable. It was disputed that notice of execution proceeding bearing No. 473 of 1980 was never served upon him. It was also contended that the present opponent had been in lawful occupation of the suit property as the

property was taken on lease by his grandfather from original owner Dahyagar and as such his grandfather, his father and respondent himself residing along with family, have had occupied the property since last 40 years as tenants. It was contended that original owner of the said property Dahyagar Hiragar as well as the present appellant have issued rent receipts in the favour of the father of the present respondent in respect to the said property, and as such the application was liable to be dismissed. It was alleged and averred that by misrepresentation of the fact, the present appellant obtained possession warrant in respect of said property. It was stated that the present appellant was looking after the work of original owner Dahyagar Hiragar and as such the present appellant also had recovered rent from the respondent's father in respect of said property. It was contended that initially, rent of the said premises was Rs.6/- and was increased to Rs. 10/- and ultimately culminated to Rs.30/-. This was above the liability of municipal tax and electricity charges. In the assessment record of the Ahmedabad Municipal Corporation, name of the father of the respondent as occupier was shown and the bills are issued. Rent of the premises had been recovered from the father of the respondent in the year

1968-69 to 30th of September, 1971 at the rate of Rs. 10/- per month and printed receipts are issued in the name of the father of the respondent one Mr. Chhaganlal Maganlal. Thereafter, present appellant recovered the rent at the rate of Rs. 30/- per month from 1st of October, 1971 and also issued printed receipts. In the years 1976-77, the appellant issued the rent receipt in the name of the respondent and which was signed by the wife of the appellant. In the year 1978 ? 79, the appellant recovered rent as receiver and gave printed receipts. It was contended that in Civil Suit No. 66 of 1963 the present respondent was not party, but all through out, the possession of said premises was held by him and his family members as a tenant and hence the decree passed in Civil Suit No. 66 of 1963 was not binding to him.

3 From the above contentions of the parties, learned City Civil Judge framed following issues vide Exh.24 :

1. Whether the decree holder proves that obstructionist is in possession of property bearing MC No. 1465/9?

2 Whether the obstructionist proves that he is in possession of the suit premises as tenant of original owner Dahyagar Hiragar since year 1941?

2.A Whether Dahyagar Hiragar and/or any person claiming through him had any legal right to confer and other right to the obstructionist?

3 Whether the decree holder is entitled for removal of obstruction as prayed?

4 Whether such an application is maintainable at law?

5 Whether the application is barred by estoppel and res judicata?

6 Whether the opponent is entitled to compensatory cost?

7 What order.

4 Learned City Civil Judge gave an opportunity to both the parties to produce evidence and voluminous documentary evidence was produced on record consisting of certified copies of the judgment, decrees, orders, etc of previous litigations in respect of the property in question. Present appellant being applicant examined himself as a witness vide Exh. 105, present respondent being opponent, examined himself at Exh.188 respectively. Original judgment creditor Dahyagar Hiragar is also examined by the present respondent as his witness vide

Exh. 215. The parties also submitted on record the written arguments.

5 After considering all the record, the learned Trial Judge came to the following findings in respect of the issues frame.

1 In the negative

2 In the affirmative

2-A Does not survive

3 In the negative

4 In the negative

5 In the negative

6 As per final order.

6 Ultimately, the learned Trial Judge after going through all the records and submissions, dismissed the application for the removal of obstruction filed by the present appellant vide judgment and order dated 21st of July, 1994, consequence of which, possession warrant issued against the present respondent in respect of the property in question stood cancelled and inoperative. Hence this First Appeal by original applicant.

7 In this appeal, the present appellant appeared as

party-in-person and argued the appeal at length. His first contention was in respect of jurisdiction of the executing court to deal with the question of tenancy. It was contended that in HRP Rent Suit No. 594 of 1963, which was filed by Savitaben, wife of Dahyagar, against the present respondent, Small Causes Court held that the landlord of the premises in question was not Dahyagar but landlord was Savitaben and hence the Executing Court cannot decide the tenancy. Secondly, it was stated that the issue was barred by principle of res judicata to the extent that though appeal came to be filed by Dahyagar Hiragar against the judgment and decree passed in HRP Suit No. 594 of 1963, but the present respondent and other tenants though had preferred Standard Rent Application and said applications were heard and decided along with the suit, none preferred appeal against the decision on Standard Rent Application and none of the tenants of Dahyagar Hiragar preferred the appeal against the judgment of the said HRP Suit and hence so far as present respondent is concerned, the judgment of Small Causes Court in HRP Suit No. 594 of 1963 became final and now so far as present respondent is concerned, the issue about the tenancy and who was the landlord had become final. Therefore, the contentions which were raised are

barred by res judicata. Again it was stated that whatever receipts are produced on record, are not clear as to whether such receipts pertain to the suit property. It was again stated that after the decision in HRP Suit No. 594 of 1963 and in view of the fact that on 23rd of March, 1949, original owner Dahyagar leased the property in question to the defendants No. 1 and 3 of Civil Suit No. 66 of 1963 authorizing them to collect rents, Dahyagar Hiragar had no authority to issue rent receipts and if such receipts are issued by Dahyagar they are without any authority and could not have been considered by the court below. It was stated that in this respect, he sought to raise issue 2(A) which was raised and framed by the court below, but the City Civil Court wrongly decided that such issue was not surviving. The finding is apparently wrong because Dahyagar had for the aforesaid reason, no authority to issue receipts. It is stated again that therefore there is no evidence at all on record that before 1963 the father of the present respondent was in occupation as a tenant of the premises in question. After 1963 when HRP Suit judgment was delivered and Dahyagar was not held landlord of the premises, so rent receipts issued by him after 1963 are without authority. It is submitted that whatever evidence

is produced, is produced in shape of ration card and recent receipts pertain to period after 1963 and this evidence cannot be considered in above view. It is stated that, as aforesaid, none of the tenants preferred appeal against the decision of H.R.P.Suit and accepted the judgment and, therefore, whatever evidence of occupation presented by the present respondent in respect of tenancy particularly receipts issued are without authority because Dahyagar was not landlord and it stands established that occupation of present respondent was through Savitaben, wife of Dahyagar Hiragar, defendant in Civil Suit No. 66 of 1963 and, therefore, the decree passed in Civil Suit No. 66 of 1963 is binding and executable against the present respondent. It is stated that on account of purchasing of the property, relationship between the present appellant and Dahyagar were strained and, therefore, Dahyagar Hiragar became witness of the present respondent, and on that count of enmity, his evidence cannot be relied upon. It is submitted that, as above said, decree is passed against the property in Civil Suit No. 66 of 1963, and the present respondent cannot obstruct the execution. It is also submitted that he had issued some rent receipts, but he signed that rent receipts as a receiver of the

property because in the proceedings of Appeal From Order, the High Court appointed him as a receiver of the property and to receive the rent in question. Before accepting rent, he had issued notices which was received by the respondent and other tenants to the effect that if they were tenants then they should pay rent, if not, then mesne profit for the use and occupation. It is, therefore, submitted that the receipts issued by him as a receiver, is not the evidence of tenancy in favour of the respondent. It is ultimately submitted that the appeal be allowed and the judgment and order impugned in this First Appeal be set aside and the warrant for possession be permitted to be executed against present respondent.

8 As against that, learned Advocate Mr.K.V. Shelat for the respondent submitted that the property in question originally belong to Bai Jadavben, mother of Dahyagar Hiragar, and Bai Jadavben died in 1940. The property in question was let to the grandfather and father of the present respondent right from 1941. It was contended that the property consists of various parts, in some of the parts of the whole property known as ?bawana dehla? was occupied by unauthorized occupation and hence Dahyagar preferred Civil Suit No. 66 of 1963 for declaration and

possession.

9 Learned Counsel took this court through various evidence i.e. Exhibit 136, Exhibit 137, Exhibit 140, receipts issued by different persons right from 1951 till 30th of August, 1985. Exhibit 140, according to learned counsel, is the evidence of witness Dahyagar, who acknowledged the tenancy of present respondent, which is not challenged or controverted by the present appellant in cross-examination. My attention was drawn to Exhibits 143 to 149 rent receipts issued by owner Dahyagar Hiragar as well as present appellant. This period is pertaining to 1967-68 wherein the present appellant had entered into an agreement to sell with Dahyagar Hiragar. Exhibit 150 is a receipt of rent given to the present respondent on 3rd of March, 1974. My attention is drawn to a letter issued by the New India Insurance Company to Maganlal, father of the present respondent at the address of present property, which is dated 27th of June, 1938. A ration card at Exhibit- 171 is also shown of the State of Bombay, which is dated 28th of October, 1952. Receipts issued by the present appellant as well as Dahyalgar and other documents are also referred, which are from

Exhibits 108 to Exhibit 122, which include documents of occupation by the present respondent and his father as well as grandfather since long. It is submitted that in HRP Rent Suit, appeal was filed by Dahyagar Hiragar and in view of the decree passed in Civil Suit No. 66 of 1963, the decisions in HRP Suits were reversed. It is submitted that it cannot be said that only because the tenants did not prefer the appeal or that none preferred appeal against the standard rent applications, the judgment of HRP Suit, though it was reversed in Appeal, is binding to present respondent. It is submitted that at Exhibit 152 a document of sale between the parties i.e. Dahyagar Hiragar as seller on one part and present appellant, his wife and his daughter as purchaser of other part, is produced at Exh. 152, which is in pursuance of agreement to sale executed by the present appellant in 1974. In the said registered sale deed, copy of which is placed at Exh. 152, Chhanalal, father of present respondent, was acknowledged as tenant by same Dahyagar Hiragar and was acknowledged by purchaser including present appellant by way of attornment and, therefore, respondent herein being tenant, cannot be evicted in execution proceedings of Civil Suit No. 63 of 1966. It is submitted that, therefore, looking to

voluminous documentary evidence in favour of the present respondent and binding fact of registered sale deed, no interference is required in the order impugned in this First Appeal.

10 In reply, though it was brought to the notice of this Court by the present appellant that in HRP Suit where father of the present respondent was already a defendant and upon a decree passed in favour of Bai Savitaben, appeal came to be filed being Appeal No.250 of 1963 and in that Appeal, father of present respondent though had expired, and his heirs were joined as parties but the present respondent was not joined as heir of deceased Chhanalal in the said appeal and, therefore, the present respondent is not direct heir of Chhanalal to claim tenancy.

11 From the above submissions of the parties and going through the voluminous records carefully and appreciating each piece of evidence independently and dispassionately, it appears that the issues which requires to be decided are (i) whether the decree passed in Civil Suit No. 66 of 1963 is executable against the present respondent and (ii) even if such decree is executable, the possession of

the premises in question can be obtained from the present respondent who claims himself to be tenant of premises in question since 1941.

12 A Civil Suit No. 66 of 1963 came to be filed by Dahyagar Hiragar initially against four defendants, namely, (i) Ranchhodlal Chimanlal, (ii) Chimanlal Sankalchand; (iii) Bai Savita the wife of Dahyagar and (iv) Jitendra, son of Dahyagar, for relief of declaration that Dahyagar Hiragar was the owner of the said whole property. Thereafter, it appears that the present appellant and Laxmiben wife of defendant No.1 were added as defendants No. 6 and 5. It appears that thereafter amendment in the plaint was sought and a relief of possession from unauthorized occupation was also sought. It is not necessary here to reproduce the reasons for decreeing Civil Suit No. 66 of 1963 in favour of Dahyagar Hiragar declaring him owner and authorising him to recover possession, but the fact remains that vide decree passed in the said Civil Suit No. 66 of 1963 on 30th of November, 1967, Dahyagar Hiragar was declared sole owner of the whole property known as ?Bawana Dehla? to which the property in question is a part. It is found from the record that an appeal against the above said decree was

filed before the High Court and came to be rejected and a Special Leave Petition also was dismissed by the Supreme Court, so the decree passed became final and in pursuance of this decree, in HRP Suit No. 594 of 1963, the decision of the Small Causes Court in Rent Suit declaring Bai Savitaben as landlord of the property was reversed in appeal and Dahyagar Hiragar was declared as landlord. Civil Revision Application came to be filed by Bai Savitaben which was also dismissed by the High Court.

13 This chequered history establishes that there is no substance in the contention of the appellant that Dahyagar Hiragar had no authority to issue rent receipts because he was not declared as landlord in HRP Rent Suit. There is no substance in the contention of the appellant that the present respondent had not preferred any appeal and, therefore, was bound by the decision of the Small Causes Court declaring Bai Savitaben to be owner and landlord of the suit premises even though the said decision was reversed in HRP Appeal No. 250 of 1966 by Bench of Small Cause Court. These decisions are judgment in rem and binding to all. It cannot be therefore said that since appeal was not filed by the present respondent and that Dahyagar Hiragar did not file appeal against the

standard rent applications, even though the judgment in HRP Suit was reversed in HRP Appeal, present respondent as well as Dahyagar Hiragar were bound by the decision of the Small Causes Court in HRP rent suit and it would be absurd contention to raise that, on that count, principle of res judicata was applicable, and that the court of City Civil had no jurisdiction to enter into to decide the question of tenancy. On the contrary, by provisions of Order 21 Rule 101 and subsequent Rules of the Code of Civil Procedure, as it stands today, all the issues arising between the parties in execution proceedings, would be tried by the executing court as a civil suit and shall be decided accordingly. In this view of the matter, the main contention is absolutely merit less that the occupation before 1963 has not been shown by the respondent and that even if any receipts are issued after 1963 i.e. after the decision of Small Causes Court in rent suits, would be subject to the decision in said rent suits and even if receipts are issued by Dahyagar Hiragar, would be without authority. It is also absurd to support a contention that such receipts should not be considered at all for the occupation of the present respondent.

14 Though the respondent in removal of obstruction application tendered reliable voluminous evidence of long occupation in premises in question, but in my humble view, irrespective of the fact of long occupation of the respondent and his father and grandfather, suffice it is to take into consideration to decide controversy that by the decree passed in Civil Suit No. 66 of 1963, which became final and judgment in rem, Dahyagar Hiragar was declared owner of the suit premises and authorized to obtain possession of unauthorized occupation. As aforesaid, again by judgment in rem, the decisions of HRP Rent Suits were reversed. Therefore, irrespective of long occupation, it was within the sweet will of the owner of the property to take any person as a tenant in part of or in whole premises owned by him. This is evident by the recitals in a registered document dated 3rd of December, 1973 in respect of the property in question, copy of which is placed on record at Exh. 152. Such recital of the said document cannot be challenged by any of the parties that Dahyagar Hiragar had acknowledged father of the present respondent as a tenant in the premises in question. The present appellant being joint purchaser along with his other family members also acknowledged present respondent as a tenant of premises. There cannot

be better reasons than this established fact to prevent the present appellant from obtaining possession of the property in question from the respondent in pretext of execution of decree of Civil Suit No. 66 of 1963, either in capacity of the purchaser or in the capacity as receiver. In fact, by executing said registered deed of sale, the present appellant is estopped from contending that the respondent is in unlawful occupation so as to obtain possession through the possession warrant in the said execution application. Not only that but after said execution of registered sale deed, the present appellant issued rent receipts of premises in question to the respondent. Merely, to avoid the law of land that no tenant would be deprived of the possession of rented premises except due process of law, it appears that confusing contentions are raised by the present appellant that principle of res judicata was applicable and that the court below had no jurisdiction to decide the question of tenancy. The present appellant might not have been shown as a heir as contended by the appellant, referring to HRP Appeal No. 250 of 1966 before the Bench of Small Cause Court, but that is not binding to the present appellant because he never contended that he was not heir of deceased Channalal tenant of the premises and

substituting of legal heirs in the said appeal was not at the instance of present respondent. Thus, in this view of the matter, the filing of the HRP suits, decisions in favour of Bai Savitaben, leasing of property by Dahyagar Hiragar to defendants No. 1 and 2 of Civil Suit No. 66 of 1963, contention that Dahyagar Hiragar had no authority to issue rent receipts, and contention that the appellant issued rent receipts as receiver after serving notices, are the facts must rest in oblivion having regard to the decree passed in Civil Suit No. 66 of 1963 which became final and more particularly when registered sale deed came to be executed between the parties in 1973 wherein tenancy of father of the present respondent was in unequivocal terms was accepted by both the parties.

15 With the above, it is pertinent to note that Dahyalgar Hiragar deposed in the obstruction application and his deposition is reliable. In fact, going through the record, it appears that, it was not disputed in Civil Suit No. 66 of 1963 that property in question was occupied by the father and grandfather of the present respondent even before the filing of the Civil Suit No. 66 of 1963. A marriage invitation card placed on record which is dated 15.2.1945 of the occasion of the marriage

which was held at the address of the property in question is reliable evidence. Ration card and other documents of occupation produced at Exhibits 171 and 172 are also documents could not have been fabricated afterwards. Letters addressed to Maganlal Ranchhodlal, grandfather of the present respondent, which are dated 27th of June, 1938 and 25th of June, 1938, placed on record vide Exhibits 169 and 170 are also reliable evidence. In addition to this, right from 1951 to 1985, various receipts of rent are produced on record at Exhibits 136, 143, 137, 150, 151,152 to 161. The evidence of Dahyagar Hiragar in the said application for obstruction of removal is reliable and not impeachable only on the ground of enmity. Noteworthy it is that in Civil Suit No. 66 of 1963 Bachubhai present appellant was defendant No.6 and when Dahyalgar took the stand that part of premises was occupied by tenants, this was not controverted by present appellant. Therefore, there is no substance in the contention of the appellant that the receipts produced do not pertain to the suit property as the receipts are not eloquent to that extent.

16 In above view of matter, going through carefully material produced on record and the fact that again

seller as well as purchasers of the property acknowledged the respondent to be the tenant of the suit premises, permitting execution of possession warrant as proposed by the present appellant would be contrary to the established law of this country.

17 In above view of matter therefore though while agreeing in all respects with the court below in First Appeal, no detailed reasons are required to be recorded, but with reference to the contentions raised in this Appeal by the present appellant, for the aforesaid reasons, this Appeal must fail and be dismissed.

18 In the result, this Appeal is dismissed and the judgment and order impugned in this Appeal is confirmed. The appellant shall bare his own cost as well as the cost of the respondent so far as this Appeal is concerned.

(J.R.VORA, J.)

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